IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 9, 2005 Session

BEN POE v. JAMES G. NEELEY, ET AL.

Appeal from the Chancery Court for Jefferson County
No. 04-068 Telford E. Forgety, Jr., Chancellor

Filed June 27, 2005

No. E2004-02332-COA-R3-CV

The Tennessee Department of Labor and Workforce Development ("the Department") denied the unemployment compensation claim of Ben Poe ("the plaintiff"). Following a decision of the Appeals Tribunal favorable to the plaintiff, the Board of Review ("the Board") found that the plaintiff engaged in work-related misconduct, thereby disqualifying him from receiving benefits. Specifically, the Board found that the plaintiff violated the work attendance policy of his employer, Specialty Defense Systems ("SDS"), (1) by taking a week off for a leg injury, but failing to turn in the paperwork that would have qualified him for leave under the Family and Medical Leave Act ("the FMLA"); and (2) by failing to call in on a daily basis as required by SDS's policy. The Board also found that the plaintiff violated the policy by walking off the job on one occasion, and by calling in sick without a doctor's excuse on another. The plaintiff filed a petition for judicial review in the trial court, which petition was denied. Although the plaintiff did not complete the paperwork for the FMLA, we hold that it was not his obligation to do so in the absence of written notice from SDS per the requirements of the FMLA. Therefore, the plaintiff cannot be penalized for a failure to comply with the FMLA. Furthermore, he cannot be "docked" for those days that he called in sick pursuant to the policy of his employer. Accordingly, we find that when his absences are re-computed in light of our holding, he did not have the requisite number of absences under SDS's policy to justify his discharge. Therefore, the judgment of the trial court and that of the Board are reversed, and the decision of the Appeals Tribunal, which held that the plaintiff was eligible for unemployment compensation benefits, is reinstated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Martha Lionberger, Morristown, Tennessee, for the appellant, Ben Poe.

Paul G. Summers, Attorney General and Reporter, and Warren A. Jasper, Assistant Attorney General, Nashville, Tennessee, for the appellee, James G. Neeley, Commissioner, Tennessee Department of Labor and Workforce Development.

No appearance on behalf of defendant, Specialty Defense Systems.

OPINION

I.

The plaintiff worked for SDS for some 12 years plus, from April 15, 1991, to October 21, 2003, when he was discharged for "violation of attendance policy."

The relevant attendance policy first took effect on August 1, 2003. It is a "no fault" policy under which all absences from work, with a few exceptions, are counted as "occurrences," and each employee is entitled to a set number of occurrences before an adverse employment action can be taken against the employee. Since the plaintiff was employed prior to August 1, 2003, he was entitled to four absences without penalty for the remainder of 2003. Any additional absences would result in a penalty. The fifth occurrence would result in a verbal warning; a written warning was administered for the sixth; the employee would be suspended for the seventh occurrence, and terminated for the eighth. There were, however, several exceptions to this rule: authorized absences, vacation leave, absences pursuant to the FMLA, jury duty, a disability covered by the ADA, bereavement leave, and absences pursuant to the Uniformed Services and Reemployment Rights Act or Title VII. Doctor's excuses are accepted, but only if the employee is taking leave under the FMLA. The policy further provided that an employee may avoid an occurrence by providing a minimum of 24 hours notice that he or she will be absent or tardy. This permits the employee to apply vacation time to the hours of work missed. If an employee must miss work because of unscheduled circumstances that preclude 24 hour notice, he or she will receive an "occurrence." Prior to the incidents giving rise to this case, the plaintiff had already accrued two occurrences – one on August 6, and another on September 2.

The plaintiff's next five absences from work resulted from an injury he sustained on September 20, 2003. On that date, the plaintiff's car broke down in traffic and he had to push it out of the road. As a result, he injured his leg. He reported to work on Monday, September 22, but was unable to work. With the permission of his supervisor, Rick Jones, he went to see his doctor, Dr. Brooks. The doctor informed the plaintiff that he believed he had ruptured the Achilles tendon in his left leg. Dr. Brooks prescribed a course of medication and referred him to the Tennessee Orthopedic Clinic. The plaintiff called Jones on September 22 to relay this information. Jones asked that he keep him apprised of the situation.

The following day, the plaintiff went to see Dr. Burns at the Tennessee Orthopedic Clinic. Dr. Burns told the plaintiff that he had, in fact, sustained a left leg strain, and told him to stay off of

his feet for a week. At that visit, Dr. Burns signed a form which excused the plaintiff from work until September 29. Upon returning from the doctor's office, the plaintiff called Jones to inform him that he would be out the rest of the week per the doctor's orders. Jones later testified, however, that he did not recall the plaintiff stating that he would be out for the full week.

That same day, the plaintiff called Jeanne Veverka, the human resources manager, to inform her that he had injured his leg and would be out of work for the remainder of the week. At that time, Ms. Veverka informed the plaintiff that if he was going to be out for any length of time, he would be eligible to take leave under the FMLA. However, in order to do so, he needed to fill out some paperwork. She decided not to mail the paperwork to him because he would be back at work before he received it in the mail. Therefore, she suggested that he come by and fill out the necessary forms. The plaintiff contends that he informed her that he was incapacitated, as he was taking anti-inflammatory medication, muscle relaxers, and icing his leg. He states he reported that he was unable to walk. Ms. Veverka testified that he never indicated that he was incapacitated, nor did he say that he would be out for the full week.

On September 24, the plaintiff did not call SDS. When he did not call in on September 25, Ms. Veverka called to inform him that he needed to get his paperwork completed for the FMLA because they had nothing in writing to show why he was absent. In the hearing before the Appeals Tribunal, she testified that he said, "I guess I need to do that," but that he further stated that he would probably not be in until September 30 since the office was closed for inventory on September 29.

The plaintiff returned to work on September 30, and brought with him excuses from both doctors. These notes described his diagnosis and indicated that he was to return to work on September 29. No one at SDS mentioned the FMLA paperwork to him. At the hearing, Ms. Veverka stated that "[i]t [was] his obligation to come in and get his paperwork once he [knew] that he [was] eligible."

Under the attendance policy, failure to call in to work each day missed results in an occurrence. Consequently, on October 2, the plaintiff received a verbal warning for not calling in on September 24, 25 and 26. That same day, he was also given a written warning for the absences accrued from September 23 through September 26. In the meeting in which he was given the warnings, he allegedly stated that he believed the employer failed to explain that he was violating the attendance policy. Understanding that the next step was suspension, he allegedly said something to the effect of, "Well you might as well suspend me now because I can't go that long without being out." He punched out after the meeting, informing his supervisor that he had to attend to some personal matters. When he returned the following day, he was informed that he was suspended for three days without pay for leaving work. He called in the morning of October 20 due to a sinus infection. He was fired when he reported for work on October 21.

On October 21, 2003, the plaintiff applied for unemployment benefits. His claim was initially denied on November 1, 2004, on the ground that he had been discharged for unacceptable job attendance. The Department determined that he was discharged for work-related misconduct.

The plaintiff appealed. A hearing was conducted on December 4, 2003, at which Mr. Jones, Ms. Veverka, and the plaintiff testified. The Appeals Tribunal reversed the Department's denial, finding that since the plaintiff presented documentation from his doctors indicating that he was to be off of his feet, and thus would be unable to provide the FMLA information, the absences accrued from September 23 through September 26 should not have been counted against him.

SDS appealed the Tribunal's decision. On January 29, 2004, the Board reversed the finding of the Appeals Tribunal, holding that the plaintiff violated the attendance policy and was therefore ineligible for unemployment benefits.

After exhausting his administrative remedies, the plaintiff filed a petition for judicial review in the trial court. The trial court subsequently dismissed the petition, finding substantial and material evidence to support the Board's decision. The plaintiff filed a timely notice of appeal.

II.

The plaintiff argues that the Board's findings of fact are not supported by substantial and material evidence, and that the Board erred as a matter of law in finding that the plaintiff was discharged for "work-related" misconduct. In particular, he argues (1) that the Board erred in considering his failure to submit FMLA paperwork as evidence of misconduct; (2) that the Board erred in finding that walking off the job was misconduct; and (3) that the Board erred in categorizing his absence for illness on October 20 as misconduct.

We agree with the plaintiff that the Board erred in finding that his failure to submit FMLA paperwork constituted misconduct. Consequently, our decision impacts the total number of occurrences that the plaintiff accrued under SDS's policy. Since the final number of occurrences is insufficient to merit a discharge under the company's policy, we hold that the plaintiff was not discharged for work-related misconduct. Accordingly, we reverse the judgment of the trial court and the Board, and reinstate the decision of the Appeals Tribunal that the plaintiff is eligible for unemployment benefits.

III.

Appellate courts and trial courts are subject to the same standard of review when reviewing administrative decisions pertaining to unemployment compensation. ***Armstrong v. Neel***, 725 S.W.2d 953, 955 n.1 (Tenn. Ct. App. 1986). That standard, codified at Tenn. Code Ann. 50-7-304(i)(2)-(3) (Supp. 2004), provides as follows:

> (2) The chancellor may affirm the decision of the board or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (A) In violation of constitutional or statutory provisions;
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> (B) In excess of the statutory authority of the agency;
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> (C) Made upon unlawful procedure;
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> (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (E) Unsupported by evidence which is both substantial and material in the light of the entire record.
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> (3) In determining the substantiality of evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the board of review as to the weight of the evidence on questions of fact. No decision of the board shall be reversed, remanded or modified by the chancellor unless for errors which affect the merits of the final decision of the board. Such petition for judicial review shall be heard by the chancellor either at term time or vacation as a matter of right, any other statute of this state to the contrary notwithstanding.

Substantial and material evidence consists of "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." ***Sweet v. State Tech. Institute at Memphis,*** 617 S.W.2d 158, 161 (Tenn. Ct. App. 1981) (quoting ***Pace v. Garbage Disposal District of Washington County***, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965)). Therefore, if the record contains such evidence, we are limited to examing the issues of law posited by the plaintiff. *See* ***Perryman v. Bible***, 653 S.W.2d 424, 429 (Tenn. Ct. App. 1983). However, we accord no presumption of correctness to the Department's conclusions of law. ***Wallace v. Sullivan***, 561 S.W.2d 452, 453 (Tenn. 1978).

In deciding whether a person is entitled to receive unemployment compensation, the Department determines if one of several disqualifying events precludes him or her from being eligible. *See* Tenn. Code Ann. § 50-7-303 (Supp. 2004). One such event, as relevant to the case before us, arises "[i]f the administrator finds that a claimant has been discharged from [his] most recent work for misconduct connected with such claimant's work . . . ." Tenn. Code Ann. § 50-7-303(a)(2). In the instant case, the Board stated the following in finding that the plaintiff's actions constituted "misconduct" within the meaning of the statute:

> FINDINGS OF FACT: Claimant's most recent employment prior to filing this claim was with [SDS] as a mechanic from April 15, 1991, until October 21, 2003. He earned $15/hour. The employer

> discharged claimant for attendance violations. On September 23, 2003, he hurt his leg off the job and informed the employer of his need to be absent. The employer told him that he must come in and fill out FMLA paperwork. Claimant said that he would but did not. He testified that the doctor told him to stay off his feet but did not show medical proof of this. He was out through September 29 but did not call the employer each day as required by policy. He returned to work on September 30. On October 2 he received a written warning for attendance and walked off the job, citing unspecified personal business. On October 3 the employer suspended him in response to his comment that "it won't be long before I miss work, so I'll take my suspension now." The employer told him that another violation would cause immediate discharge. On October 20 claimant missed work with a sinus infection for which he did not visit a doctor. The employer discharged him.
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> CONCLUSIONS OF LAW: The Board of Review holds that claimant is not qualified for benefits. The issue is whether claimant was discharged for work-related misconduct under [Tenn. Code Ann. §] 50-7-303(a)(2). Misconduct is intentional or negligent behavior that materially breaches a duty owed the employer by the employee. Here, the evidence does establish misconduct. Although claimant was in fact injured in late September, he took a remarkably arrogant attitude toward keeping his job. He made no effort to supply the employer with FMLA paperwork, walked off the job for "personal business," and finally took a sick day without a doctor's excuse. He had worked there twelve years and knew procedures. This is misconduct. The employer has the right to expect employees to come to work regularly.

The Board's rationale for holding that the plaintiff engaged in "work-related" misconduct can be summarized as follows: (1) the plaintiff "made no effort to supply the employer with FMLA paperwork"; (2) he walked off the job for "personal business"; and (3) he "took a sick day without a doctor's excuse." We will now review the Board's decision in accordance with the standard of review articulated in Tenn. Code Ann. § 50-7-304(i)(2)-(3).

IV.

SDS implemented its new attendance policy on August 1, 2003. Since the plaintiff was employed prior to that date, SDS decreed that, for the remainder of 2003, the plaintiff was entitled to four occurrences, *i.e.*, a pro-rated share of the total occurrences provided for under the new policy, before an adverse employment action could be taken against him. The policy, in effect, provides that

upon obtaining four occurrences, an employee would begin incurring penalties for each subsequent occurrence. As relevant to the case before us, employees "who are eligible and/or participating with . . . The Family and Medical Leave Act" are exempt from this policy.

The evidence adduced at the hearing revealed that when the plaintiff called Ms. Veverka in human resources to inform her of his injury, she told him that if he was going to be absent for any length of time, he would be eligible for leave under the FMLA. However, as she testified at the hearing, an issue arose as to the paperwork required:

> I said I could probably mail these papers but he would probably be back to work before he could receive them. So I suggested that he come by and fill out his paperwork and he said, okay, he would come by and do that. Then at that time [sic] did not indicate to me that he was incapacitated in anyway [sic] and unable to make it in.

This conversation occurred on September 23. When she did not hear from him the following day, she called him on September 25 to remind him that he needed to fill out his FMLA paperwork and that he needed to get something in writing to explain his absence. She testified that he responded by saying, "I guess I need to do that." However, she further testified that "he knew he had inventory on the 29th and he would probably not be in until the 30th." The plaintiff testified that he informed her that he was under a doctor's care, that he was taking anti-inflammatory drugs and muscle relaxers, had ice on his leg, and was unable to walk at the time. Consequently, he could not come in to complete paperwork prior to his return to work.

The Board faulted the plaintiff for failing to show medical proof of the fact that the doctor told him to stay off his feet, and failing to supply SDS with the FMLA paperwork. We find, however, that these findings impose an obligation on the plaintiff that does not exist under the FMLA.

The FMLA permits an employee to receive up to 12 weeks of unpaid leave if the employee has "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D) (1999). The Department of Labor has subsequently developed a "brightline test" for what constitutes a "serious health condition": (1) the employee must be incapacitated for more than three days; (2) he must be seen once by a doctor; and (3) he must be prescribed a course of medication. ***Brannon v. OshKosh B'Gosh, Inc.***, 897 F.Supp. 1028, 1036 (M.D. Tenn. 1995). In the instant case, the plaintiff was incapacitated for a week, seen by two doctors, and he was prescribed a course of medication.

Generally, for an employee to benefit from the FMLA, he or she must provide the employer with not less than 30 days notice if the leave is foreseeable. 29 U.S.C. § 2612(e)(1) (1999). However, where, as in the instant case, the need for leave is not foreseeable, the employee need only furnish notice "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a) (2005). The regulations further provide that in furnishing notice,

> [t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee . . . will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

29 C.F.R. § 825.303(b). Consequently, the employee need not even expressly state that he is seeking leave under the FMLA. Rather, he need only indicate that he is seeking some leave.

Once the employee furnishes notice, the burden shifts to the employer to gather the necessary information. *See* 29 C.F.R. § 825.303(b); ***Hammon v. DHL Airways, Inc.***, 165 F.3d 441, 450 (6th Cir. 1999). The employee's notice also triggers the requirement that the employer furnish *written* notice detailing the specific expectations and obligations of the employee, and explaining the consequences of failing to adhere to those obligations. 29 C.F.R. § 825.301(b)(1) (2005). This written notice must include, among other things, any requirements pertaining to medical certification of a serious health condition. 29 C.F.R. § 825.301(b)(1)(ii). Generally, when the leave is foreseeable and the employee has provided 30 days notice, he or she should furnish the medical certification prior to the beginning of the leave period. 29 C.F.R. § 825.305(b) (2005). However, when this is not possible,

> the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

Id.

In light of the foregoing discussion, we find two deficiencies in SDS's conduct which prohibits it from counting all of the absences accrued from September 22 through September 26 as occurrences that violate the attendance policy. First, SDS did not furnish written notice to the plaintiff outlining his obligations. This written notice must be furnished by the employer within a reasonable time of being notified that leave is sought – within one or two days if possible – and if leave has already commenced, the notice should be mailed to the employee's address. 29 C.F.R. § 825.301(c). If the employer fails to furnish this written notice, it "may not take action against an employee for failure to comply with any provision required to be set forth in the notice." 29 C.F.R. § 825.301(f). The testimony of Ms. Veverka indicates that the plaintiff was informed that he needed to complete the paperwork to be eligible for leave under the FMLA. However, at no time does it appear that he received any *written* notice of his obligations. Ms. Veverka testified that they agreed that it did not make sense to send the paperwork when he would be back to work the following week; however, this does not suffice as a reason to exempt SDS from the written notice requirement.

Accordingly, the sixth circuit has held that where an employer fails to furnish written notice, the employee's failure to submit medical certification is not a sufficient reason for the employer to deny the employee FMLA leave. *See* ***Perry v. Jaguar of Troy***, 353 F.3d 510, 514 (6th Cir. 2003).

Additionally, we find that even if SDS *had* furnished written notice, and that notice had set forth the plaintiff's obligation to provide medical certification of his "serious health condition," his failure to complete the paperwork upon returning to work is not fatal to his claim. In fact, when an employee has received written notice, he must provide the requested information "within the time frame requested by the employer (*which must allow at least 15 calendar days after the employer's request*)." 29 C.F.R. § 825.305(b) (emphasis added). We therefore find that the plaintiff's failure to voluntarily appear upon returning to work to fill out this paperwork is not fatal to his FMLA claim, particularly when SDS was prohibited from penalizing him when no written notice was provided. *See* 29 C.F.R. § 825.301(f).

Under the FMLA, SDS had an obligation to furnish written notice to the plaintiff before he was required to submit any additional information. We do not know exactly what the often-referred-to "paperwork" consisted of; however, we do know that the plaintiff never received anything in writing. The plaintiff's failure to call on September 26 following Ms. Veverka's reminder call on September 25 led her to "assume[] that he was not going to take advantage [sic] his Family Medical Leave . . . and that these occurrences would have to count."

We find that the Board's finding that the plaintiff "made no effort to supply the employer with FMLA paperwork" is contrary to statutory authority as it runs contrary to the provisions of the FMLA. *See* Tenn. Code Ann. § 50-7-304(i)(2)(a). Since SDS effectively deprived him of the opportunity to obtain leave under the FMLA by not fulfilling its statutory obligations, the plaintiff cannot be penalized for failing to do something he was not obligated to do. Consequently, the absences from September 22 through September 26 could have been excused under the FMLA and, therefore, should not have counted as "occurrences." However, before determining how many occurrences the plaintiff actually accrued, we must address the other basis for finding a violation of SDS's policy, *i.e.*, that the plaintiff failed to call in to his employer on September 24, 25 and 26.

V.

The Board found that "[the plaintiff] was out through September 29 but did not call the employer each day as required by policy." It is undisputed that the plaintiff did not call on September 24, 25 and 26; however, the plaintiff contends that when he called on September 23, he informed both his supervisor and Ms. Veverka that he would be out for the week. Neither Jones nor Veverka recalled that the plaintiff relayed this information. Given the deference we accord to the Department's credibility determinations, we cannot say that the Board's finding that the plaintiff did not inform Ms. Veverka and Mr. Jones that he would be out for the week is "unsupported by evidence which is both substantial and material." Tenn. Code Ann. § 50-7-304(i)(2)(E).

However, assuming without deciding that the plaintiff violated the attendance policy by failing to call in on the three days in question, we still find that he did not have the requisite number of absences to justify a discharge. Prior to the injury he sustained on September 20, he had earlier occurrences on August 6 and September 2. Therefore, excepting September 22 and 23 – since he called on both days – we find that he had only seven occurrences at the time of his discharge. We are counting August 6, September 2, September 24-26, October 2, and October 20. According to SDS's policy, the seventh occurrence would prompt a written warning and a three-day suspension. Eight occurrences were required prior to being fired. Since the plaintiff did not have the requisite eight occurrences to justify discharge, we hold that the plaintiff's termination was contrary to SDS's attendance policy. Consequently, we do not find the requisite work-related misconduct to warrant denial of unemployment compensation benefits. Therefore, the plaintiff is eligible for unemployment benefits.[1]

In view of our decision, we do not find it necessary to address the plaintiff's contention that the incidents of October 2 and October 20 should not have been counted.

VI.

The decision of the trial court and the Board is reversed. The decision of the Appeals Tribunal holding that the plaintiff is eligible for unemployment compensation is hereby reinstated. This case is remanded to the Department for action consistent with this opinion. Costs on appeal are taxed to the Tennessee Department of Labor and Workforce Development.

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CHARLES D. SUSANO, JR., JUDGE

[1]The plaintiff also questions whether an employer can rely upon absences *due to illness* to prove employee misconduct under the statute. He relies upon the case of ***Simmons v. Traughber***, 791 S.W.2d 21, 26 (Tenn. 1990). Given our disposition of this case, we do not find it necessary to reach this issue.